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No. 715

In the Supreme Court of the United States

October Term, 1958

ROBERT W. HEISS, PETITIONER,

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 1a) is reported at 261 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 (Pet. App. 3a). A timely petition for rehearing *en banc* was denied on December 17, 1958 (Pet. App. 4a). The petition for a writ of certiorari was filed on February 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the individual members of the Civil Service Commission are indispensable parties to a suit for reinstatement by a former employee of the Post Office Department, discharged at the direction of the Commission as unsuitable for Federal employment.

STATUTES AND REGULATIONS INVOLVED

Pertinent parts of the Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 632, 633, Executive Order 10577, 19 F.R. 7521 (following 5 U.S.C. 631 (Supp. V)), Civil Service Regulation 2.104, 5 C.F.R. 2.104 (1949), and Civil Service Regulation 2.112, as amended, 19 F.R. 1691, are set forth in the appendix, *infra*, pp. 10–13.

STATEMENT

This is a suit challenging petitioner's dismissal from the Federal Civil Service for making false statements in his Civil Service papers.

The complaint, filed by petitioner in the United States District Court for the District of Columbia, alleges that he is a member of the classified Civil Service; that he was employed in the Post Office Department as an engineering draftsman; and that, on October 7, 1955, he was informed of his removal from his employment by a "Notification of Personnel Action" (Appellant's App. 2, 5).[1] This Notification was attached to and incorporated into the complaint. It states that petitioner was being removed on the

[1] Petitioner has filed nine copies of the appendix to his brief as appellant in the court below. This appendix contains the proceedings in the district court. References to it will be designated as "Appellant's App. —."

authority of "C.S. Central Office ltr. of 9/28/55 * * * For false and misleading statements in your civil service papers concerning separations from previous employments and experience, and other evidence of unsuitability for Government employment" (Appellant's App. 5).

The defendants' answer denied that plaintiff was a member of the classified Civil Service at the time alleged, and averred that his appointment to the position from which he was removed was subject to investigation by the Civil Service Commission. The answer further stated that the procedures followed by the Civil Service Commission and the Post Office Department were legal and proper, and that the case was moot for the reason that plaintiff had retired from Government service (Appellant's App. 7–8).

On February 7, 1958, the Government filed a motion to dismiss on the ground that petitioner had not substituted two indispensable parties (Appellant's App. 8). In support of the motion, the Government pointed out that defendants George M. Moore and Philip Young had resigned from the Civil Service Commission on February 28, 1957; and that Harris Ellsworth and Christopher H. Phillips,[1] who succeeded to their offices on April 17, 1957, had not been substituted as parties defendant within the 6-months' period required by F.R.C.P. 25(d) (Appellant's App. 9–10. On March 19, 1958, the District Court entered

[1] Mr. Phillips left office on December 30, 1957; Mr. Ellsworth, on February 28, 1959.

an order dismissing petitioner's complaint without prejudice (Appellant's App. 13).

On appeal, the judgment was unanimously affirmed by the Court of Appeals, which stated:

> It is conceded that the Civil Service Commission directed the removal action complained of.
>
> * * * * *
>
> We believe that under the circumstances of this case the Civil Service Commissioners were indispensable parties to the suit and, they not being before the court, the action was properly dismissed. *Cf. Blackmar* v. *Guerre,* 342 U.S. 512 (1952); *Benenati* v. *Young,* 95 U.S. App. D.C. 120, 220 F. 2d 383 (1955). [Pet. App. 2a.]

ARGUMENT

Petitioner was removed from his position at the direction of the Civil Service Commission, which found that he had made false statements in his Civil Service papers. The Commission's direction to the Postmaster General was mandatory under Section 5.4 (d) of Executive Order 10577, 19 F.R. 7521. Since petitioner was removed under the mandate of the Commission, individual members of the Commission had to be joined as parties defendant before the legality of their action in directing the removal could be adjudicated. This was the basis of this Court's decision in *Blackmar* v. *Guerre,* 342 U.S. 512, and of the Court of Appeals' holding in *Benenati* v. *Young,* 220 F. 2d 383. We submit that both courts below were clearly correct in applying this well-established principle to the present litigation. And there is no

conflict of decisions, nor any other ground for review by this Court.

1. In the *Blackmar* case, this Court held that in any suit challenging a dismissal from Federal employment, the individual Civil Service Commissioners must be joined as parties if the Commission has acted in the matter. In that case, the Commission merely affirmed the action of the Veterans' Administration in dismissing an employee. If a bare affirmance of agency action is sufficient to make the individual members of the Civil Service Commission indispensable parties to a reinstatement suit, then it obviously follows that they are indispensable parties where, as here, the Commission itself has directed the employee's removal.

Congress and the President have made the Commission's directions with respect to the hiring and firing of civil service employees binding upon every major agency in the Executive Branch of the Government. The statutory foundation for the Commission's sweeping supervisory role is found in Section 2 of the Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 633, which directs the Civil Service Commission to "aid the President, as he may request, in preparing suitable rules" for governing the Federal Civil Service. In Executive Order 10577, 19 F.R. 7521 (following 5 U.S.C. 631 (Supp. V)), President Eisenhower established the current Civil Service Rules. In this Order, the President directed the Civil Service Commission "to promulgate and enforce such regulations as may be necessary to carry out and enforce the provisions of the Civil Service Act and Rules,

the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission". Sec. 5.1, *infra*, pp. 10–11. Whenever the Commission issues specific instructions (within its jurisdiction) as to dismissal, discipline or restoration of an employee, the appointing officers in the employing agency are under a Presidential mandate to comply with those instructions. Sec. 5.4(d), *infra*, pp. 11–12. In the event that both the appointing officer and the agency head disregard the Commission's instructions, the President's Order instructs the Commission to certify the facts to the Comptroller General, whereupon "no payment shall be made of the salary or wages accruing to the employee concerned." Sec. 5.4(e), *infra*, p. 12. Even the appointing authority of chiefs of executive agencies is delegated by the Commission (5 C.F.R. 2.101 (Supp. 1958)) and may be withdrawn by the Commission "whenever it finds that the Commission's regulations and instructions have not been followed * * *" (5 C.F.R. 2.110(b) (Supp. 1958)).

It is particularly important to note here the special and comprehensive role occupied by the Civil Service Commission in investigating and determining the qualifications and suitability of an individual for Federal Civil Service employment. The pertinent regulations explicitly provided:

> (d) Appointments are made conditional under this section to retain the [Civil Service] Commission's jurisdiction to investigate the qualifications of an applicant after appointment, and to order removal when it finds an employee is disqualified for Federal employ-

ment. [Civil Service Regulation 2.112, *infra*, p. 13.]

Under regulations in force at the time of petitioner's removal, appointments were conditional upon Civil Service investigation for a period of 18 months. For false statements in application papers, however, the Commission reserved the right to order removal even after the 18-months' period had expired. Civil Service Regulation 2.112(c), *infra*, pp. 12–13.

In the present case, the Commission found, after investigation, that petitioner had made "false and misleading statements" in his Civil Service papers, and it determined that he was unsuitable for Government employment (Appellant's App. 5). Accordingly, it ordered the Post Office to remove him.

In light of the foregoing, it cannot be doubted that the Post Office was legally bound to accept the Commission's direction to remove petitioner. As *Blackmar* shows, the Postal authorities cannot reinstate him unless and until the Commission reverses its order of removal. Petitioner apparently recognized this at the time he filed his complaint, for he named the Civil Service Commissioners as parties, and prayed that they, as well as the Postmaster General, be compelled to reinstate him. Since the Commissioners are indispensable parties to the action, petitioner's failure to substitute their successors necessarily abated the action. F.R.C.P. 25(d); *Snyder* v. *Buck*, 340 U.S. 15.*

* Since the controlling issue in this case is whether the Commissioners are indispensable parties, we do not undertake to demonstrate that the procedures guaranteed petitioner by

2. The decisions relied on by petitioner have no application. Since the Commissioners' order directing petitioner's removal would have to be reversed by them before petitioner could be reinstated, it is obvious that the considerations underlying this Court's decision in *Williams* v. *Fanning*, 332 U.S. 490, are inapposite here.[4] Equally without merit is petitioner's contention that the decision below conflicts with *Schwartz* v. *Mathias*, 235 F. 2d 620. There, the Third Circuit simply held that the Postmaster General was an indispensable party to an employee's suit challenging his dismissal, on security grounds, under P.L. 733, 81st Cong., 5 U.S.C. 22–1. There was, of course, no occasion for the Third Circuit to decide whether the Civil Service Commissioners should also have been treated as indispensable parties.

3. Petitioner urges that the decision below forces Federal employees, wherever resident, to litigate their dismissals exclusively in the District of Columbia. But certainly this is no cause for complaint by peti-

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statute were followed. Even if there were color to petitioner's claim that he had been denied his rights under the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652, by the Commission's direction ordering his removal, it is plain that this issue could not be adjudicated unless the Commissioners were before the court. The Postmaster General cannot reinstate petitioner independently of the Commission's determination without violating Section 5.4(d) of Executive Order 10577. Relief against the Postmaster General alone would thus create a conflict between the Commission's unreversed order of dismissal and the District Court's judgment of reinstatement.

[4] That case turned on the proposition that the superior is not indispensable where there is no obstacle to granting all of the relief sought by a decree directed to the subordinate.

tioner, who is not only a resident of the District of Columbia but was employed there (Appellant's App. 1, 5). Moreover, the same result would follow from petitioner's contention that the Postmaster General is the sole indispensable party. Indeed, the basis of the Third Circuit's decision in *Schwartz* was that the Postmaster General can only be sued at the seat of Government. Under *Blackmar* v. *Guerre, supra,* there is no other place in which an employee like petitioner can sue for reinstatement. Finally, it should be noted that centralizing this kind of litigation has resulted in the creation, by the courts of the District of Columbia, of a uniform system of Civil Service law based upon their interpretations of the relevant statutes and regulations. Congress has not seen fit to abandon this system, and this case presents no occasion for this Court to entertain petitioner's arguments against it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1959.

APPENDIX

The Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 632, 633, provides in pertinent part as follows:

> SEC. 632. Civil Service Commission; appointment; removal, and compensation of commissioners.
>
> The President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as civil service commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.
>
> * * * * * *
>
> SEC. 633. Rules.
>
> It shall be the duty of said commissioners:
>
> (1) Preparation of.
>
> First. To aid the President, as he may request, in preparing suitable rules for carrying this section and sections 632, 635, 637, 638, and 640–642 of this title, into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect.
>
> * * * * *

Executive Order 10577, 19 F.R. 7521 (following 5 U.S.C. 631 (Supp. V)) provides in pertinent part as follows:

> SEC 5.1 *Regulations.* (a) The Commission is authorized and directed to promulgate and

enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

* * * * *

SEC. 5.4 *Enforcement authority of the Commission.* (a) Whenever the Commission finds that any person has been appointed to or is holding a position in violation of the Civil Service Act, Rules or Regulations, or that any officer or employee in the executive branch has violated this order or any of the laws, rules or regulations administered by the Commission, it is authorized, after giving due notice and opportunity for explanation to the officer or employee and the agency concerned, to certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal or other corrective action.

(b) Whenever the Commission finds that any officer or employee in the executive branch has failed to adhere to established policies, regulations, and standards relating to personnel management subject to the jurisdiction of the Commission, it shall instruct the agency head to take corrective action.

(c) Whenever, on the basis of an appeal by an employee, the Commission finds that its regulations prescribing procedures to be followed by agencies in connection with adverse actions for disciplinary reasons have not been followed, or that adverse action has been taken for political reasons except as may be required by law, or resulted from discrimination because of marital status, it shall instruct the agency to restore the employee to duty.

(d) Whenever the Commission issues specific instructions as to discipline or dismissal of an officer or employee, or to restore an officer or employee to duty, the appointing officer

concerned shall comply with the Commission's instructions.

(e) If the appointing officer fails to carry out the instructions of the Commission issued under section 4(a) of this Rule, the Commission shall certify the facts to the head of the agency concerned. If the head of the agency fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the Comptroller General of the United States, and shall furnish a copy of such certification to the head of the agency concerned; and thereafter no payment shall be made of the salary or wages accruing to the employee concerned.

Civil Service Regulation 2.112, as amended, 19 F.R. 1691, provides in pertinent part as follows:

SEC. 2.112 *Appointments subject to investigation.* (a) The following types of appointment are "subject to investigation" by the Commission to establish the individual's qualifications and suitability for employment in the competitive service:

(1) Probational.
(2) Reinstatements.
(3) Temporary.
(4) Indefinite appointments under Parts 2, 7, and 8 of this chapter.
(5) All conversion actions.
(6) Transfers.
(7) Reemployments.

* * * * *

(c) For a period of 18 months from the effective date of one of the types of appointment in paragraph (a) of this section, the Commission may order removal if investigation discloses that the employee is disqualified for any of the reasons listed in section 2.104. After 18 months from the effective date of such appointment the Commission may order removal

only on the basis of the disqualifications listed in section 2.104(a)(4).

(d) Appointments are made conditional under this section to retain the Commission's jurisdiction to investigate the qualifications of an applicant after appointment, and to order removal when it finds an employee is disqualified for Federal employment.

* * * * *

Section 2.104 referred to in Section 2.112 quoted above, provides (5 C.F.R. 2.104 (1949)):

SEC. 2.104 *Disqualifications of applicants.* (a) An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:

(1) Dismissal from employment for delinquency or misconduct.

(2) Physical or mental unfitness for the position for which applied.

(3) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.

(4) Intentional false statements or deception or fraud in examination or appointment.

(5) Refusal to furnish testimony as required by section 5.3 of this chapter.

(6) Habitual use of intoxicating beverages to excess.

(7) On all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

(8) Any legal or other disqualification which makes the applicant unfit for the serv[illegible]

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